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No. 82-429

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

FLOYD WILLIAMS, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED BY PETITIONERS

1. May a Court of Appeal set aside findings of fact made by the District Court in an employment discrimination case where those findings (1) were not found to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure, and (2) were not the result of legal errors made by the District Court?

2. Did the Court of Appeals err in retroactively applying the 300 day limitation period to this employment discrimination class action where the District Court had applied the 180 day limitation period followed in the Ninth Circuit at the time of the District Court's decision?

PARTIES

Respondents do not disagree with the statement of Parties made by Petitioner.

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No. 82-419

In the Supreme Court

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OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

VS.

FLOYD WILLIAMS, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

Respondents hereby oppose the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed by Petitioner Owens-Illinois, Inc.

STATEMENT OF CASE

Respondents accept Petitioner's statement of the case to the extent it contains facts as opposed to legal argument, with the following corrections and additions:

1. The Court of Appeals discussed the pertinence of the relevant labor market and specifically ruled that:

> The low percentage of blacks employed in certain areas of the plant suggests possible discrimination. Whether the studies in evidence establish a prima facie case, however, can be conclusively determined only by correlating these statistics with the corresponding percentage of blacks in the relevant geographic labor market. (Pet. App. B at 19 and 20.)

Furthermore, at trial and on appeal the petitioners urged the adoption of their zip code analysis of the residences of their current employees to prove the appropriate labor pool. Since the District Court used this labor pool in its findings the Court of Appeals reversed and remanded because "the district judge may have premised his conclusion that Owens-Illinois did not engage in discriminatory practices on this improper market determination." (Pet. App. B at 22.)

2. Not only did the reviewing Court determine that the company failed to rebut plaintiffs statistical case, but the Court of Appeals noted "Indeed, Owens-Illinois' own study suggested that the percentage of blacks hired in craft positions was extremely low." (Pet. App. B at 18-19.)

3. The District Court never made any finding as to whether a prima facie case was established and if so whether it was rebutted by defendant. (Pet. App. B at 59-60, ftn 6)

4. The District Court's pretrial order held:

> Any personnel activity, practice, or procedure at defendant's Oakland plant compelled by an agreement between defendant and any union representing employees at the Oakland plant shall be deemed nondiscriminatory. The Court will not issue any order altering or modifying any such personnel activity, practice, or procedure. (Resp. App. at A-1.)

At no time did the District Court alter this order. Neither plaintiffs nor defendants chose to move for permissive joinder of the unions.

5. Both the Court of Appeals and the District Court treated this as a hiring case in the sense that a main issue was the discriminatory placement and assignment of new hires. (See Pet. App. A at 5, Finding 7; Pet. App. B at 17-18; Pet. App. A at 21, Finding 22; Pet. App. B at 32-33)

6. The date on which the District Court made its ruling that the limitations period would be 180 days was June 28, 1978. This ruling was made in the Court's pretrial order, which predated any decision by the Court of Appeals regarding the applicable limitations period.

SUMMARY OF ARGUMENT

The first question presented concerning the application of the clearly erroneous rule has already been answered by this Court in the very general form in which it is asked. Since Petitioners do not specify the factual findings they feel are in question, this Court would be burdened with reviewing all the findings of the District Court and then determining whether the Appellate Court properly applied the rule.

The question is also premature since the case has simply been remanded for further findings upon the District Court's application of the correct law.

The issues discussed concerning the proper labor market and the effect of the union agreements involve legal issues determined adversely to Petitioners below. Petitioners do not certify as a question the correctness of the determinations; nor do they deny they are legal issues that were contested at both the district and appellate court levels. Rather they argue that this Court should review almost the entire case to make sure that these legal issues were actually a part of this case. This is not a proper basis for the grant of certiorari.

Similarly, the question presented concerning the retroactivity of the ruling on the limitation period for this discrimination action does not present any new or substantial issue of law, but would simply require this Court to review the application of established principles of law by the Court of Appeals.

In addition, the retroactivity question fails to even raise an issue in this case since the case relied upon by Petitioner for the purported "prior rule" of the Circuit, *Rodrigues v. Southern Pacific Transportation Company*, 587 F.2d 980 (9th Cir. 1981), was not decided until after the District Court made its ruling on this issue.

Moreover, *Rodrigues* does not stand for the "prior rule" claimed by Petitioner. In fact, it indicates indirectly that the Circuit had not decided that issue yet, which was explicitly confirmed by the Circuit soon thereafter. The rule finally delivered in this Circuit, and the only rule it made, was the one also applied in this case. Thus there is no issue

of a change in a prior rule, and no question of retroactive application is involved.

REASONS FOR DENYING THE WRIT

I

NO NEW OR SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW IS PRESENTED UNDER PULLMAN V. SWINT, AND THE QUESTION IS PREMATURE SINCE THE MATTER WAS REMANDED FOR FURTHER FINDINGS

A. Certiorari Should Not Be Granted Because This Question As Formed Fails To Present Any Issue Not Already Answered And Is Also Too General

In *Pullman v. Swint*, 456 U.S. ....., 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) this Court has already answered the question posed by the petitioner. A finding of fact not the result of legal error and not found to be clearly erroneous under Fed.Rule Civ.Pro. 52(a) cannot be set aside. The petitioner raises no new issue of law for this Court to review.

In addition the question presented is too general. It fails to specify any finding of fact that was not properly treated by the Court of Appeals. Petitioners expect this Court to go through all the District Court findings and the Court of Appeals decision to determine what findings were improperly treated. As such the question is too vague and unclear for review and would pose a great, time-consuming burden on this Court. In *Pullman*, the question arose regarding a precisely framed factual issue (the issue of discriminatory intent); whereas here the procedural question is raised only in a very general way.

If the Court undertook review of such general questions, there would probably be few cases which are reversed by the Courts of Appeal wherein one party could not request review of that case on the same basis. This Court would then simply be acting as a court of last resort in the ordinary appeal process. Besides, in the instant case, the reviewing Court explicitly noted the *Pullman* standards and remanded for further findings under the normal procedure recommended by *Pullman*. (Pet. App. C. at 2)

In their argument Petitioners discuss at some length two issues in which the Court of Appeals found legal error—the question of the relevant labor market, and the question of the effect of the union agreements. Whether Petitioners are attempting to rephrase the issue so as to include legal errors under the Rule 52(a) standard, or are simply trying to obtain a substantive review by this Court of these two decisions, the question as presented clearly raises neither, nor any other issue that is a sufficient ground for the exercise of this Court's discretionary grant of certiorari review.

B. The Question is Premature

This question is not ripe for certiorari review by this Court because it has been remanded to the District Court for a review of its findings under correct legal standards. The ultimate issue of discrimination has not been decided. This issue remains open until the District Court has had the opportunity to review its findings and make new findings in light of the proper legal standards. The appropriate time for this Court to review the treatment of each finding of fact is only when final action has been taken.

C. Petitioners Did Not Certify For Review The Appellate Court's Decision That The Legal Findings Regarding The Appropriate Labor Market And Union Agreement Were Erroneous

Neither issue is related to the first question presented to the Court although subsumed under the argument. Both are mixed questions of law and fact which the petitioners are seeking to have indirectly reviewed. Since these questions have not been certified by the petitioners for review, it is submitted that these are not proper subjects for this Court's review.

D. The District Court Made Specific Findings Regarding The Relevant Labor Pool Which The Court of Appeals Properly Reversed Due To Legal Error

Petitioner asserts that the "trial court's findings of fact do not purport to be based in any respect upon relevant labor market calculations." (Petition at 12). This assertion is false since the District Court made specific findings regarding the appropriate labor pool for the black class in Findings 1 and 7 (Pet. App. A at 2-3, 5-6). This labor pool was one urged by the Petitioner at trial and was derived from a zip code analysis of the residences of then current employees. The petitioners only now seemingly urge the irrelevance of the labor market because the labor market which they have urged was rejected by the Court of Appeals.

Clearly, a determination of the labor market was necessary for comparison with the number of blacks and women hired and employed in various departments of the defendant's plant in order to determine whether statistical disparity in placement established a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Inter-*

national Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

The Petitioners do not deny that the District Court made errors of law in this area nor do they cite any law to question the correctness of the Appellate Court's ruling. They simply assert, "But, as we have shown, the relevant labor market error purportedly made by the District Court did not influence any findings of fact" (Petitioners brief, page 13) and demand that this Court should reverse for "determination of impact of *legal error*" (Emphasis added.)

This Court has held that, "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman v. Swint, supra*, 102 S.Ct. at 1791. It is not the place of the Court of Appeals to determine the "impact" of the legal error as urged by Petitioners, but to remand for further findings. Most importantly, the Court held in *Pullman* that Rule 52 does not apply to questions of law or mixed questions of law and fact. *Pullman v. Swint, supra*, 102 S.Ct. at 1789-1792.

E. The District Court's Pretrial Ruling That Collective Bargaining Agreements "Shall Be Deemed Non-Discriminatory" Was Ruled By The Court Of Appeals To Be Erroneous As A Matter Of Law And Remanded For Further Findings

Here again the petitioner does not deny the error of the District Court's pretrial ruling that the union agreements shall be deemed non-discriminatory. It also admits that the District Court made findings of non-discrimination regard-

ing these collective bargaining agreements to which the ruling applied. Once again it urges that somehow the Court of Appeals must decide to what degree the legal error influenced the finding of fact. Indeed as a result of the District Court's pretrial ruling, the petitioner relied on these agreements for its defense and the District Court adopted those contentions in its finding. (Pet. App. B. at 18-19.)

As stated above this Court has ruled clearly in *Pullman* that where there is legal error, remand is the only appropriate course since the District Court is the primary fact finder and would be in the best position to know the effect any erroneous legal views had on its fact finding and to make further findings.

II

THE PETITIONER'S ISSUE REGARDING RETROACTIVE APPLICATION OF THE 300 DAY LIMITATION PERIOD IS NOT LEGITIMATELY RAISED BY THE FACTS OF THIS CASE, NOR DOES IT RAISE ANY NEW ISSUE OF LAW

A. This Case Does Not Present Any New Or Substantial Issues Of Law With Regard To The Criteria For Retroactive Application Of A Judicial Decision

This Court in *Chevron Oil Company v. Hudson*, 404 U.S. 97 (1971) laid out three separate criteria to be used to determine on what special occasions judicial decisions will not be given retroactive effect. The Court of Appeals in this case was well aware of the criteria and did not feel they required interference with the normal operation of appellate review in this case. Petitioner now simply questions the application of these settled principles of law to the facts of this case. No new question is raised with regard to the

criteria to be used or any special applications of them. In fact, this retroactivity issue was not even raised in the request for rehearing below. Thus petitioner again is simply looking to this Court as a court of last resort in the normal appeal process, rather than providing any basis for the special exercise of discretion required to grant a petition for certiorari.

B. The Trial Court's Decision In This Question Was Issued Before The Decision Petitioner Cites as Purportedly Establishing a 180 Day Limitation "Rule" In The Ninth Circuit

Petitioner maintains that the trial court's use of the 180 day statute of limitations "followed the clear authority of the Ninth Circuit in *Rodriguez v. Southern Pacific Transportation Company*" 587 F.2d 980 (9th Cir. 1978), (Petition at 17.) This is not possible. The opinion in *Rodriguez* was originally decided November 9, 1978, and was amended on denial of rehearing on December 18, 1978. In contrast, the trial court in the instant case decided to apply the 180 day statute of limitations in its pretrial order dated June 28, 1978. (Resp. App. at A-2). The opinion in *Rodriguez* could not have provided authority for a Pretrial Order which predated it by almost six months.

C. The Ninth Circuit Never Adopted a 180 Day Limitation Period As Argued By Petitioner

An inspection of the decision in *Rodriguez v. Southern Pacific Transportation Company, supra,* relied upon so heavily by Petitioner as creating the 180 day rule, will show that the decision was confined to the issue of denial of a post-judgment motion under Fed. R. Civ. Proc. 60(b) as an

abuse of discretion. The District Court had dismissed the action because of plaintiff's "failure to file his discrimination charge within 180 days." 587 F.2d 980. The Court of Appeals could not review the trial court's decision on this issue because the notice of appeal was not timely.

Petitioner quotes at length from the section of the opinion in *Rodriguez* wherein the Court took note of the Eighth Circuit opinion in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975) which adopted the 180 day rule which the District Court had relied on as the only Circuit Court ruling on this issue at the time. Only on this basis did the Court of Appeals determine that the District Court had not abused its discretion in denying the motion since in a footnote, omitted from the quote in Petitioner's brief, the Court noted that after the district judge's ruling, in *Doski v. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976) the Fourth Circuit rejected the position adopted by the Eighth Circuit in *Olson*. *Rodriguez, supra*, 587 F.2d at 981 n. 4.

This footnote makes it clear that the Court in *Rodriguez* recognized the existing split of opinion in other circuits which it did not attempt to resolve in its opinion. This was confirmed in *Ramirez v. National Distillers and Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978), decided some two weeks after *Rodriguez*. In *Ramirez*, the Court noted that the Ninth Circuit had reserved decision on the length of the statute of limitations, but that the 300 day statute of limitations had growing support. 586 F.2d at 1319 n.5.

Before the District Court's pretrial order in this case, most of the cases in the Ninth Circuit and district courts of California applied the 300 day rule. *Kirk v. Rockwell*

International, 578 F.2d 814 (9th Cir. 1978); *Williamson v. Chevron Research Co.*, 12 FEP 95 (N.D. CA, 1976); *Harris v. Pan American World Airways*, 74 FRD 24 (N.D. CA, 1977). See also *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 369 n.23 (1977) (dictum stating that since California has a state agency, charges may be filed as long as 300 days after the act.) *Wofford v. Safeway Stores, Inc.*, 78 FRD 460, 492 (1978) (noting that the question remains open.)

Only one local District Court opinion supported the trial Court's use of the 180 day limitation period, and it was later overturned on appeal and the 300 day rule applied. *Wiltshire v. Standard Oil*, 447 F.Supp. 756 (N.D. CA, 1978), *rev'd and remanded*, 652 F.2d 837 (9th Cir. 1981).

CONCLUSION

For all the foregoing reasons Respondents urge denial of the petition for writ of certiorari.

Dated: October 5, 1982

Respectfully submitted,

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GEORGE TODD WITHY
COUNSEL OF RECORD
Attorneys for Respondents

Appendix A

In the United States District Court for the Northern District of California

Floyd Williams, et al.,
Plaintiffs,

vs.

Owens-Illinois, Inc.,
Defendant.

[Filed June 28, 1978]

Pretrial Order

Counsel for the 12 named plaintiffs (including both original and intervening plaintiffs) and for defendant attended the June 16, 1978 pretrial conference in this case. This Court now makes the following pretrial order:

1. Any personnel activity, practice, or procedure at defendant's Oakland plant compelled by an agreement between defendant and any union representing employees at the Oakland plant shall be deemed nondiscriminatory. The Court will not issue any order altering or modifying any such personnel activity, practice, or procedure.

2. Summary judgment is hereby granted, in defendant's favor, as to plaintiffs' claims: (a) under Executive Orders 11246, 11375; (b) for punitive and compensatory damages under Title VII of the 1964 Civil Rights Act (hereinafter, "Title VII"); (c) under 42 U.S.C. § 1981 (hereinafter, "§ 1981"), to the extent based on sex discrimination; (d) under § 1981, to the extent the claims allege racial discrimination against blacks and are based on events occurring before June 11, 1972.

3. The first black named plaintiff to file an EEOC charge alleging racial discrimination was Eugene Williams, on September 3, 1971. The first female named plaintiff to file an EEOC charge alleging sex discrimination was Alice Brice, on September 19, 1974. Named plaintiff Charlotte Harris alleges racial discrimination against herself because she is Mexican-American. She filed her EEOC charge on January 11, 1977. Thus, the following Title VII claims are time-barred: (a) claims alleging racial discrimination against blacks and based on events occurring before March 7, 1971; (b) claims alleging sex discrimination against women and based on events occurring before March 23, 1974; (c) Harris' race-discrimination claims, to the extent based on events which occurred before July 15, 1976.

4. In the preceding paragraph, this Court applied to all claims a 180-day statute of limitations for filing an EEOC charge. Plaintiffs contend that the limitations period for filing an EEOC charge is actually 300 days. However, the 300-day period is inapplicable to this case, since there is no evidence that any named plaintiff filed a charge with the California EEOC or any similar state or local agency [see 42 U.S.C. § 2000e-5(e)].

Defendant contends that the limitations period for claims alleging racial discrimination against blacks is only 90 days, which was the limitations period when Eugene Williams filed his EEOC charge. However, there is no indication that the EEOC had completed action on that charge by March 24, 1972, when the statute of limitations for filing an EEOC charge was increased to 180 days. Thus, the 180-day limitations period applies [see *Inda v. UAL*, 565 F.2d 554, 560-561 (9th Cir. 1977)].

5. Since there were no Mexican-American plaintiffs in this case until the June 1, 1977 filing of the amended complaint, plaintiff Harris' § 1981 race-discrimination claims are time-barred, to the extent they are based on events occurring before June 1, 1974.

6. This Court has considered the continuing-violation doctrine and concludes that it is inapplicable to this case.

7. This Court hereby certifies two classes in this case: (a) all blacks who have been employed at defendant's Oakland plant and who have Title VII race-discrimination claims based on events occurring on or after March 7, 1971, and § 1981 race-discrimination claims based on events occurring on or after June 11, 1972; (b) all women who have been employed at defendant's Oakland plant and who have Title VII sex-discrimination claims based on events occurring on or after March 23, 1974.

8. The trial of this case shall commence Monday, July 10, 1978, at 10:00 a.m. The trial will be to a jury, which will consider questions of both liability and remedy. The trial will not be bifurcated. The jury verdict will be advisory as to all matters the jury considers, except the matters of: (a) whether defendant was guilty of such racial discrimination as to make it liable for § 1981 compensatory and punitive damages; (b) the amount, if any, of such compensatory and punitive damages.

Dated: June 28, 1978

/s/ Robert H. Schnacke
United States District Judge